STATE OF MICHIGAN

IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS

CHARLES SINGTON,

Plaintiff-Appellee,

vs.

CHRYSLER CORPORATION,
a.k.a. DAIMLERCHRYSLER
CORPORATION,

Defendant-Appellant.
_____/

S Ct No 119291

Ct App No 225847

WCAC No 99-0110

BRIEF OF LIBNER, VanLEUVEN, EVANS, PORTENGA & SLATER, P.C. AS AMICUS CURIAE

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STATEMENT OF QUESTIONS PRESENTED

I. DOES WDCA 301(4), AS AMENDED IN 1987, ABOLISH THE COMPENSABILITY OF PARTIAL DISABILITY?

Plaintiff and Amicus Libner, VanLeuven say "no."

Defendant and Amicus MSIA say "yes."

The lower tribunals *did not answer* this question (which is reason enough to decline to address it).

II. DOES THE WDCA REQUIRE A CAUSAL RELATIONSHIP BETWEEN THE INJURY AND THE UNEMPLOYMENT/WAGE LOSS?

The Court of Appeals, Plaintiff and Amicus Libner, VanLeuven say "no."

The magistrate, WCAC, Defendant and Amicus Michigan C of C say "yes."

STATEMENT OF FACTS

A. SHOULDER PROBLEMS

Plaintiff Charles Sington began work for Defendant Chrysler Corporation in 1971 (37a). Plaintiff was a "floater," working wherever needed. His job included heavy lifting and reaching.

It was stipulated that, on June 24, 1994, Plaintiff injured his left shoulder on the job (Px3). It is not clear from the record how long (if at all) Plaintiff worked after this injury before going off work for shoulder surgery on October 18, 1994.

Plaintiff returned to work on January 3, 1995 (I 26[1]). Although no longer required to do the heavier jobs (I 76), Plaintiff continued to visit first aid with shoulder complaints (Px3).

Plaintiff went off work again on August 14, 1996 (I 30) for surgery on his *right* shoulder (Shinar 14). The magistrate found, as a fact, that this right shoulder problem was not work-related (14a).

Plaintiff returned to work on November 15, 1996 (I 31) with restrictions of no heavy lifting (I 82).

B. LAST COURSE OF EMPLOYMENT

In February, 1997, Plaintiff was put on more strenuous work (loading doors) (I 125,

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[1] I = Volume I of trial transcript
II= Volume II of trial transcript

II 22). Plaintiff complained that this job hurt his shoulders (I 125, II 26), which sometimes (not always) resulted in his being relieved from the job (II 28). Finally, Plaintiff saw a doctor on March 4, who restricted Plaintiff from the door job (II 8-9). Plaintiff worked at least two days thereafter, then went off on vacation (II 12). Two days into the vacation (on March 10), Plaintiff suffered a stroke (I 63, 84; II 18; 37a).

Plaintiff has not returned to work since.

C. PROCEEDINGS

The magistrate found that, because of continuing restrictions (albeit prophylactic) on the left shoulder (15a), Plaintiff remains "disabled" (13a). The magistrate nevertheless denied benefits because Plaintiff's unemployment was not caused by the shoulder injury (15a). Having thus disposed of the case, the magistrate did not determine whether Plaintiff's post-injury work lasted 100 weeks or more (so as to bring WDCA 301(5)(d) into play), nor whether the post-injury work created a new earning capacity. He did, however, label Plaintiff's post-injury work "regular" (15a).

The Appellate Commission affirmed. The Court of Appeals reversed, holding that, so long as Plaintiff is "disabled" because of the 1994 injury, it doesn't matter *why* he is unemployed. The Court of Appeals remanded for a decision on how many weeks Plaintiff worked after the 1994 injury.

DISCUSSION

I. INTRODUCTION

The statutes involved in the case at bar are the following subsections of WDCA 301:

> (4) As used in this chapter, "disability" means a limitation of an employee's wage earning capacity in work suitable to his or her qualifications and training resulting from a personal injury or work related disease. The establishment of disability does not create a presumption of wage loss.
>
> (5) If disability is established pursuant to subsection (4), entitlement to weekly wage loss benefits shall be determined pursuant to this section and as follows:
>
> (a) If an employee receives a bona fide offer of reasonable employment from the previous employer, another employer, or through the Michigan employment security commission and the employee refuses that employment without good and reasonable cause, the employee shall be considered to have voluntarily removed himself or herself from the work force and is no longer entitled to any wage loss benefits under this act during the period of such refusal.
>
> (b) If an employee is employed and the average weekly wage of the employee is less than that which the employee received before the date of injury, the employee shall receive weekly benefits under this act equal to 80% of the difference between the injured employee's after-tax weekly wage before the date of injury and the after-tax weekly wage which the employee is able to earn after the date of injury, but not more than the maximum weekly rate of compensation, as determined under section 355.
>
> (c) If an employee is employed and the average weekly wage of the employee is equal to or more than the average weekly wage the employee received before the date of injury, the employee is not entitled to any wage loss benefits under this act for the duration of such employment.
>
> (d) If the employee, after having been employed pursuant to this subsection for 100 weeks or more loses his or her job

through no fault of the employee, the employee shall receive compensation under this act pursuant to the following:

(*i*) If after exhaustion of unemployment benefit eligibility of an employee, a worker's compensation magistrate or hearing referee, as applicable, determines for any employee covered under this subdivision, that the employments since the time of injury have not established a new earning capacity, the employee shall receive compensation based upon his or her wage at the original date of injury. There is a presumption of wage earning capacity established for employments totalling 250 weeks or more.

(*ii*) The employee must still be disabled as determined pursuant to subsection (4). If the employee is still disabled, he or she is entitled to wage loss benefits based on the difference between the normal and customary wages paid to those persons performing the same or similar employment, as determined at the time of termination of the employment of the employee, and the wages paid at the time of the injury.

(*iii*) If the employee becomes reemployed and the employee is still disabled, he or she shall then receive wage loss benefits as provided in subdivision (b).

(e) If the employee, after having been employed pursuant to this subsection for less than 100 weeks loses his or her job for whatever reason, the employee shall receive compensation based upon his or her wage at the original date of injury...

(9) "Reasonable employment," as used in this section, means work that is within the employee's capacity to perform that poses no clear and proximate threat to that employee's health and safety, and that is within a reasonable distance from that employee's residence. The employee's capacity to perform shall not be limited to jobs suitable to his or her qualifications and training.

The quoted subsections deal, generally, with calculation of and entitlement to wage-loss benefits when (as here) there is post-injury employment.

II. INABILITY TO DO ONE JOB IS "DISABILITY" UNDER THE STATUTE

A. INTRODUCTION

Although the Court would be justified on passing this issue by,[2] for the sake of completeness, Amicus will address it.

The relevant language is the first sentence of WDCA 301(4):

> As used in this chapter, "disability" means *a limitation* of an employee's wage earning capacity in *work* suitable to his or her qualifications and training resulting from a personal injury or work related disease (emphasis added).

"A" limitation in suggests that *any* limitation (such as inability to perform one job duty) would be enough. However, "a limitation" is itself limited by the phrase "of an employee's wage earning capacity." Since what must be limited is the ability to earn wages, a limitation having no effect on such ability (i.e., not foreclosing even one potential job for which the worker is qualified) is not "a limitation." *Michales v Morton Salt Co*, 450 Mich 479 (1995) (hearing loss, though rendering some jobs more difficult, is not loss of earning capacity, where it does not preclude any job for which the worker is qualified).

That leaves the question of whether WDCA 301(4) requires inability to perform *more than* one job. The answer depends on the meaning of the phrase "work suitable to his or her qualifications and training" (added to the definition by 1987 PA 28). If, by "work,"

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[2] The lower tribunals did not address it, evidently because it was not argued. Nor did the Supreme Court's order granting leave in this case refer to this issue.

the Legislature meant "some" or any" work, inability to do even one job would satisfy WDCA 301(4).

Defendant, however, would read "work" as meaning "*all* work." Since a worker whose work-related injury forecloses only one of a hundred jobs (or forecloses 99 out a hundred jobs, for that matter) is not limited in *all* work, Defendant's construction would call such a worker "not disabled." In other words, Defendant advocates a construction that would eliminate the compensability of partial disability, instead requiring a worker to be *totally* disabled in order to be considered disabled *at all*.[3]

B. THE SOURCE OF THE DEFINITION NEGATES A TOTAL DISABILITY STANDARD

The definition of disability now contained in WDCA 301(4) first appeared in Professor Larson's treatise on workers compensation:

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[3] Defendant attempts to obscure this fact by arguing that an electrician able to work part-time, or one able to do only common labor, would still be considered "disabled" under its construction (Defendant's brief p. 24).

However, even the Social Security Act considers one relegated to part-time work to be disabled under its total disability standard (*Cohen v Secretary of HHS*, 964 F 2d 524, 530 (CA6, Mich, 1992)), and workers compensation law considers a worker limited to part-time work to be an "odd-lot" worker, hence *totally* disabled. 2 Larson, *Workers Compensation Law* Sec. 57.51(a).

As for a skilled worker relegated to common labor, that was the definition of *total* disability under the skilled/unskilled dichotomy (which Defendant would evidently now resurrect). *Jameson v Newhall Co*, 200 Mich 514, 518-519 (1918).

In short, Defendant's electrician hypotheticals illustrate, not that Defendant is not advocating total disability, but only that the disability standard it advocates, like other total disability standards, would not require absolute prostration.

> Compensable disability is inability, as a result of a work-connected injury, to perform or obtain work suitable to the claimant's qualifications and training.

2 Larson, *Workers Compensation Law* Sec. 57.00, quoted in *Dressler v Grand Rapids Die Casting Corp,* 402 Mich 243, 251 (1978).[4]

Although Larson's definition includes the ambiguous word "work," in context it is apparent that he did not mean to say *all* work. This follows from the fact that Larson's definition was intended to be a distillation of the law of the 50 states; yet[5] few if any of those states require a worker to be unable to perform *all* work before being entitled to compensation.[6]

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[4] See also Larson at sec. 57.22(a):

> Compensable disability is generally defined as inability, as a result of a work-connected injury, to perform or obtain work suitable to the claimant's qualifications and training.

[5] As Professor Larson recognized: see Sec. 57.12(a) of his treatise, where he explicitly recognizes the compensability of partial disability, and the cases cited throughout his chapter 57, many of which awarded compensation to workers despite their ability to handle, and actually handling, regular work post-injury.

[6] Defendant cites comments by Professor Larson at a meeting of the Michigan Self-Insurer's Association in 1987 to the effect that Larson did not think a worker precluded from doing only one job is "disabled" (58a). However, Larson's personal opinion of what the law *ought to be* hardly qualifies as a description of what the law *is*. Moreover, comments made by Professor Larson later in life cannot retroactively change the meaning of the language he put in his treatise, much less overrule the numerous cases he cited that uphold a partial disability standard.

Finally, if we are going to start considering retroactive explanations of what professors meant, we would have to consider Professor St. Antoine's article "Defining Disability:

Any doubt about this was dispelled by Theodore St. Antoine's December, 1984 report *Workers Compensation in Michigan: Costs, Benefits and Fairness* (portions attached). While advocating Professor Larson's definition, Professor St. Antoine did not think that Larson's definition created a Social-Security-type, total disability standard. St. Antoine report at pp. 27-28.

Moreover, Professor St. Antoine thought that adoption of Larson's definition would "be of small practical consequence" (St. Antoine Report at p. 27; 70a). Since creation of a total disability standard would, *per contra*, be of great practical consequence (it would overrule 70 years of precedent that recognizes the compensability of partial disability[7]), this further confirms that St. Antoine did not think Larson's definition created a total disability standard.

The reason Professor St. Antoine's report is relevant is that, in adopting the 1987 amendments, the Michigan Legislature was greatly influenced by it (if indeed the report did not prompt the amendments).[8] Having obtained the new definition of disability from

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The Approach to Follow" at page 60 of 3 *Ed Welch On Worker's Comp* 60 (May, 1993) (attached) in which St. Antoine makes clear that he does not read the Larson definition as precluding compensation when an injury disables a worker from only one job.

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Foley v Detroit United Railway, 190 Mich 507, 515 (1916); *Stewart v Lakey Foundry*, 311 Mich 463, 468 (1945); *Thomas v Continental Motors Co*, 315 Mich 27, 34 (1946); *Finch v Ford Motor Co*, 321 Mich 469, 474 (1948); *Kidd v GMC*, 414 Mich 578, 591-592 (1982).

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See page 5 of the March 23, 1987 Legislative Analysis of SB 67, reproduced at 70a. In addition, Senator John Cherry, who was a member of the House-Senate Conference

Professor St. Antoine, it is reasonable to infer that the 1987 Legislature, like Professor St. Antoine, did not intend to significantly change the definition of disability, and did not understand the new definition to replace Michigan's 70-year-old partial disability standard with a total disability standard.

C. THE LEGISLATIVE RECORD DOES NOT SUPPORT A TOTAL DISABILITY STANDARD

Some of the legislative materials cited by Defendant are irrelevant,[9] and the remainder unenlightening.

1. It is said that the 1987 amendments were intended to help employers (70a). However, eliminating *all* workers compensation liability would help employers; does it then follow that the 1987 amendments were intended to eliminate *all* workers compensation liability? Saying that the amendments were meant to help employers begs the question of exactly *how* or *how much* they were intended to help. The amended definition does help employers, in that it eliminates the "freakish" rule whereby a skilled worker was considered totally disabled, despite ability to handle unskilled work. *Wright v Vos Steel Co,* 205 Mich App 679, 684 (1994). However, the claim that employers were

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Committee on SB 67, stated, "the definition in the Conference Report and the legislation we have considered to date contains the St. Antoine 'clean slate' language." Senate Jrn, 84th Leg, 1987 Reg. Sess, 1234-1235.

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The materials at 46a to 57a relate to a statute passed *before* WDCA 301(4) and (5) were added to the Act.

meant to be helped to the extent of abolishing the compensability of partial disability is more than can reasonably be inferred merely from the stated intent to help employers.

2. It is said that the legislation was meant to bring Michigan in line with other jurisdictions (70a). However, since most other jurisdictions use a partial rather than total disability standard, this intent argues *against* the total disability construction urged by Defendant.

3. As important as what the legislative record says is what it does *not* say. Neither the legislative analyses nor the reported debates ever stated that the amendment would junk Michigan's partial disability standard in favor of a total disability standard. Since that would be a radical departure from prior law, one would expect it to have prompted some discussion. The lack of such discussion shows that no one understood the amendments to have that effect.

D. A TOTAL DISABILITY STANDARD CONTRADICTS OTHER SECTIONS OF THE ACT

While the import of the legislative record may be ambiguous, the violence Defendant's construction would do to the Act is not. If Defendant's construction were adopted, numerous sections of the Act would become absurd or meaningless:

WDCA 358 coordinates workers compensation wage-loss benefits with unemployment compensation. However, only one available to work is entitled to MESC benefits. That can occur under a partial disability standard, since a worker prevented

from handling some jobs by a work-related injury may nevertheless be capable of handling other jobs. However, under Defendant's definition, a worker able to do other jobs would not be "disabled." Thus, the situation expressly contemplated by WDCA 358 (a worker entitled to both workers compensation and MESC benefits) would never arise.

WDCA 361(1) expressly provides for wage-loss benefits "while the incapacity for work resulting from a personal injury is partial." But if WDCA 301(4) requires an employee to be disabled from *all* work, there never would be a "partial incapacity" case to which WDCA 361(1) applies.

WDCA 301(5) defines wage-loss benefits where a worker works post-injury, expressly recognizing that a worker may be "disabled" at the same time he is working (see WDCA 301(5)(d)(*iii*)). That situation would never exist if a worker capable of handling even one job is not "disabled."

Similarly, the last sentence of WDCA 371(1) coordinates wage-loss benefits with post-injury wages. If a worker capable of working post-injury is not disabled at all, there never would be a case in which a worker is receiving wages and wage-loss benefits simultaneously.

It might be argued that a total disability standard does not render the last two statutes dead letters, since a worker might be totally disabled, yet earn wages from post-injury *favored* work. This *reduces* the extent to which a total disability standard conflicts with the statutes, but does not *eliminate* the conflict.

Thus, WDCA 301(5) plainly covers more than favored work:

a. WDCA 301(5)(a) refers to offers of work, not only from the employer on whose job the worker was injured, but also work offered by *other* employers. Since employers are not in the habit of offering favored work to workers not injured at their place of work, this subsection plainly contemplates offers of nonfavored (i.e., regular) work.

b. Note also WDCA 301(5)(a)'s reference to jobs offered through the MESC. As already noted, the ability to handle such jobs negates the total disability Defendant claims is required.

c. WDCA 301(5)(d) requires determination of whether post-injury employment creates a new earning capacity, when the post-injury employments last 100 weeks or more. Since favored work by definition is nonregular work that creates no new earning capacity,[10] 301(5)(d) plainly contemplates situations in which the worker who is disabled per 301(4) may nevertheless be doing nonfavored, regular work post injury. *That situation would never arise if a worker's handling even one regular post-injury job precludes his being considered disabled in the first place.*

A statute should be construed, if possible, to harmonize rather than conflict with other parts of the same statute. *Franges v GMC*, 404 Mich 590, 611 (1979). Since reading "work" in WDCA 301(4) as meaning "some or any work" would harmonize with the statute,

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10 *Smith v Pontiac Motor Car Co*, 277 Mich 652, 657 (1936).

whereas construing "work" as meaning "all work" would create the conflicts Amicus has pointed out, the ambiguity should be resolved against the latter construction.

E. CONCLUSION

Michigan's legislature knows how to create a total disability standard when it wants to: "Compensation shall not be payable for partial disability due to silicosis or other dust disease." MCL 417.4 (since repealed). The fact that the 1987 Legislature did not so provide, but instead drew its new definition of disability from sources which understood the definition to mean partial disability, lead to the conclusion that the Legislature never intended to replace the seventy-year-old partial disability standard with the total disability standard urged by Defendant.

III. A CAUSAL RELATIONSHIP BETWEEN INJURY AND UNEMPLOYMENT/ WAGE LOSS IS NOT REQUIRED

A. THE STATUTE CREATES NO SUCH REQUIREMENT

Since workers compensation is a statutory system, if there is a requirement that the injury cause the unemployment/wage loss, Defendant ought to be able to point to a section of the statute that so provides. Defendant has not done so, because there is no such section.

Employers casting about for some statutory support for an injury-causing-wage-loss requirement sometimes point to the last sentence of WDCA 301(4):

> As used in this chapter, "disability" means a limitation of an employee's wage earning capacity in work suitable to his or

> her qualifications and training resulting from a personal injury or work related disease. *The establishment of disability does not create a presumption of wage loss.* (emphasis added)

The meaning of the emphasized sentence is plain: the mere fact that a worker is disabled (i.e., unable to do a job) does not mean that he has lost wages. The sentence thus makes explicit a point implicit in the concept of loss of earning capacity: that *wage* loss and loss of *earning capacity* are two different things.[11]

However, there is no mention of a work-related injury in the emphasized sentence, no causal language, and perforce no language requiring that the injury cause wage-loss. As a matter of grammar, the emphasized sentence simply does not say what employer partisans wish it said. Defendant concedes as much in its brief (pp. 14-15).

The Court has recognized in recent years that application of any statute starts with the plain language of the statute; where the meaning can be obtained from the language alone, there is no need of construction; and whatever result follows from the language follows, regardless of whose ox is being gored and even if it leads to a result some consider absurd. *DiBenedetto v West Shore Hospital*, 461 Mich 394 (2000) (WDCA 301(5)'s basing wage loss benefits on average weekly wage "at the original date of injury" controls, even though it guts the stepped-up wage-loss benefits created by WDCA 356(1)); *Russell v Whirlpool*

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[11] See also WDCA 301(5)(d)(*iii*): "If the employee becomes reemployed and the employee is still disabled..." This expressly recognizes that an employee may be employed (hence earning wages) at the same time that he is *disabled* (i.e., suffering loss of earning capacity).

Financial Corp, 461 Mich 579 (2000) (because WDCA 301(5)(e) says nothing about terminations for cause, such terminations are not disqualifying).[12] Here, since the plain language of the statute creates no injury-causing-wage-loss requirement, the court's duty is to defer to the Legislature and decide the case without reference to any such requirement.

B. RULES OF CONSTRUCTION LEAD TO THE SAME RESULT

Because the lack of an injury-causing-wage-loss requirement follows from the plain language of the statute, we need not resort to rules of construction. However, even if we pretended that the statute is ambiguous, all the rules of construction argue against any injury-causing-wage-loss requirement.

One such rule is that a statute (particularly one as interconnected as the Workers Compensation Act) should be read as a whole. *Stowers v Wolodzko*, 386 Mich 119, 133 (1971). Doing that, we find that the Legislature knows how to create causal requirements in the Act when it wants to:

> An employee, who receives a personal injury *arising out of* and in the course of employment...shall be paid compensation...Time of injury...not *attributable to* a single event shall be the last day of work... WDCA 301(1) (emphasis added)
>
> Mental disabilities and conditions of the aging process...shall

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[12] Implicit in such cases is the view that, if the result seems unfair or absurd, the remedy is with the Legislature which chose the language.

> be compensable if *contributed to* or aggravated or accelerated by the employment in a significant manner... WDCA 301(2) (emphasis added)
>
> ..."disability" means a limitation of an employee's wage earning capacity in work suitable to his or her qualifications and training *resulting from* a personal injury or work related disease... WDCA 301(4) (emphasis added)
>
> If an employee is injured *by reason of* his intentional and wilful misconduct, he shall not receive compensation...WDCA 305 (emphasis added)
>
> If death *results from* the personal injury of an employee, the employer shall pay... WDCA 321 (emphasis added)
>
> ...an employer shall not be liable for compensation... for such periods of time that the employee is unable to obtain or perform work *because of* imprisonment or commission of a crime. WDCA 361(1) (emphasis added)
>
> If the injury received by such employee was *the proximate cause* of his or her death... WDCA 375(2) (emphasis added)
>
> If the employee, after having been employed pursuant to this subsection for 100 weeks or more loses his or her job *through* no fault of the employee, the employee shall receive compensation under this act...WDCA 301(5)(d) (emphasis added)
>
> If the employee, after having been employed pursuant to this subsection for less than 100 weeks loses his or her job *for whatever reason*, the employee shall receive compensation based upon his or her wage at the original date of injury... WDCA 301(5)(e) (emphasis added)

If the Legislature intended to create a requirement that there be a causal nexus between the injury and the wage loss/unemployment, wouldn't it have been equally explicit?

The last quoted subsection (301(5)) is particularly relevant, and invokes three more rules of construction:

1. WDCA 301(5) *specifically addresses* the *cause* of a worker's unemployment and resultant wage loss, and provides that the only causes that affect the worker's benefit level are loss of a job *due to the worker's fault* and *creation of a new earning capacity.*[13] Under the rule *expresso unius est exclusio alterius* (*Stowers v Wolodzko, supra*, at 386 Mich 133), it follows that loss of a post-injury job for *other* reasons (such as a stroke or heart attack) does *not* affect the benefit level.

2. Here we have a statute (WDCA 301(5)) that *specifically* delineates what effect various causes of unemployment have on wage-loss benefits. Since an injury-causing-wage-loss requirement (if it existed) would be at most a general rule, elevating that requirement over WDCA 301(5) would contradict the rule that specific statutes control over general ones. *Heims v School District No 6,* 253 Mich 248, 251-252 (1931).

3. If an injury-causing-wage-loss requirement were created, it would mean that a worker disabled by a work-related injury who loses his job through no fault of his own would not receive the wage-loss benefits to which WDCA 301(5) says he is entitled. An injury-causing-wage-loss requirement would thereby create a conflict with WDCA 301(5), contrary to the rule that different parts of a statute should be construed to harmonize

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[13] Even these factors operate only where post-injury employment last 100 or more weeks.

rather than conflict. *Franges v GMC, supra,* at 404 Mich 611.

As another example of such conflict, consider the effect of *work avoidance.* WDCA 301(5)(a) says that a worker is disqualified only where he unreasonably refuses to work. This disqualification provision is hedged around with safeguards, such as the requirement that the work offered be reasonable, and that the offer be sufficiently specific. However, an injury-causing-wage-loss requirement would enable even employers who have offered *no* favored work (and who perforce have not complied with WDCA 301(5)(a)'s safeguards) to avoid liability by showing that the worker's unemployment was caused by the worker's failure to look for work rather than the injury. This "work-avoidance" defense not only enables employer's to evade WDCA 301(5)(a)'s safeguards; it also contradicts 301(5)(a) insofar as it disqualifies workers in cases in which 301(5)(a) would say the worker is *not* disqualified.

Note also that, if an employer can argue that there is no liability because the unemployment is due to work avoidance, this in effect imposes a duty on the worker to seek work, thus contradicting the longstanding rule that injured workers need not seek work:

> An employee...cannot reasonably be required in his partially disabled condition to go among strangers looking for work. Such requirement would not be reasonable, and the probabilities of his obtaining work if required to seek it would be very remote... the compensation cannot be reduced upon the theory that there are classes of work which he is able to do and which he might obtain if he diligently sought for it, and

which on the other hand he might not be able to obtain at all.

Industrial Accident Board Bulletin No. 3, p. 10 (Dec. 19, 1913). The Legislature implicitly endorsed this view by not inserting a seek-work requirement into the Act, in contrast to the Employment Security Act. MCL 421.28(1).

Another rule of construction is that all portions of a statute should be given effect, and none treated as mere surplusage. *Stowers v Wolodzko, supra*, at 386 Mich 133. WDCA 301(4) expressly requires that the work-related injury cause loss of earning capacity. Where would that requirement be under an injury-causing-wage-loss requirement?

a) In cases where the injury causes *no* loss of actual work, but does cause loss of earning capacity, an injury-causing-wage-loss requirement would dictate no compensation, thus making satisfaction of the injury-causing-lost-earning-capacity requirement meaningless.

b) Conversely, in cases where the injury *does* cause actual loss of work, since every such case also satisfies the injury-causing-lost-earning-capacity requirement[14] the latter requirement would be redundant.

In short, *creating an injury-causing-wage-loss requirement would transform Michigan workers compensation into a pure wage-loss system, and render the Act's references to loss of earning capacity redundant and meaningless.*

A final relevant rule of construction is that, as remedial legislation, the Workers

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14 "actual loss of wages causally linked to a work-related injury is loss of wage-earning capacity." *Haske v Transport Leasing Co,* 455 Mich 628, 662 (1997).

Compensation Act should be liberally construed to grant rather than deny benefits to injured, disabled workers. *Deziel v Difco Laboratories,* 403 Mich 1, 33-35 (1978). Consequently, any doubt on the question should be resolved against creation of an injury-causing-wage-loss requirement.

C. THE CASE LAW AFFIRMS THAT THERE IS NO SUCH REQUIREMENT

To understand the case law, we have to distinguish *total* from *partial* disability cases. Since a totally disabled worker is no less so merely because subsequent events may also be disabling, such subsequent events did not reduce total disability benefits. *Neal v Stuart Foundry*, 250 Mich 46, 50 (1930) (totally disabled worker jailed); *Lynch v Briggs Mfg Co,* 329 Mich 168, 172 (1950) (totally disabled worker went off work because hit by auto).[15]

Conversely, since a totally disabled worker cannot become *more totally* disabled, subsequent events adding to such a worker's disability did not entitle such a worker to additional wage loss benefits. *McKay v Jackson & Tindle,* Inc, 268 Mich 452, 456 (1934) (pain worsened); *Blust v National Brewing Co*, 285 Mich 103, 107 (1938); *Dunavant v GMC*, 325 Mich 482, 487 (1949) (worker struck down by tuberculosis)[16].[17]

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Since the auto collision occurred because the worker's injured knee went out on him, *Lynch* could alternately be explained by the rule that an employer liable for an initial injury is also liable for subsequent aggravation.

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The reliance by the *Dunavant* court and by the employer on *Neal*, *McKay*, and *Blust* make it clear that the "totally disabled worker may not become more disabled" rule was the basis of decision in *Dunavant*, rendering *Dunavant*'s suggestion that the work-related

One also has to consider the difference between post-injury work that creates no new earning capacity and post-injury work that does. In the latter case, it has long been held that the employer is entitled to subtract the value of the post-injury earning capacity (presumptively measured by actual wages earned in non-favored work). Moreover, if non-favored post-injury work is lost for reasons unrelated to the original injury, wage loss benefits do not resume.[18] *Dalton v Candler-Rusche, Inc,* 65 Mich App 282 (1975) (worker who established new earning capacity lost job because of heart attack).[19]

However, where neither of the foregoing situations obtain (neither post-injury nonfavored work, nor prior finding of total disability), the law reverted to its "default setting": so long as the work-related injury continued to contribute to loss of *earning capacity*, the case was compensable despite claims that *something else* was contributing, such as

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injury must cause the loss of work *dictum*. Even that *dictum* was overruled in *Powell v Caso Nelmor Corp,* 406 Mich 332, 354, n 11 (1979).

17

Whether this rule survives the post-1980 amendments is not involved in the case at bar, since Plaintiff is not totally disabled.

18

This rule is not entirely logical, since ability to find a well-paying job, whether or not favored, is not necessarily inconsistent with continuing inability to do *other* jobs (i.e., continuing loss of earning capacity).

19

The fact that Dalton did regular work post-injury, thus creating a new earning capacity, distinguishes *Dalton* from both *Powell* and the case at bar.

- insanity. *Ward v Heth Bros,* 212 Mich 180 (1920);
- age and senility. *LeTourneau v Davidson,* 218 Mich 334 (1922);
- layoff. *Cundiff v Chrysler Corp,* 293 Mich 404, 408 (1940); *Shaw v GMC,* 320 Mich 338, 344-345 (1948);
- leprosy. *Sotomayor v Ford Motor Co,* 300 Mich 107 (1942);[20]
- heart attack. *Medacco v Campbell, Wyant & Cannon Foundry,* 48 Mich App 217 (1973); *Nederhood v Cadillac Malleable Iron Co,* 445 Mich 234, 258 (1994);
- termination. *Tury v GMC,* 80 Mich App 379, 383 (1978), lv den 402 Mich 908 (1978);
- cancer. *Powell v Casco Nelmor Corp, supra,* at 406 Mich 352;
- problem pregnancy. *Lee v Koegel Meats,* 199 Mich App 696, 702 (1993), lv den 447 Mich 1009 (1994) (specifically rejecting the argument that the 1981 amendments overruled *Powell*)

Note that, with the exception of some overruled *dictum* in *Dunavant*, the cases uniformly rejected any requirement that a work-related injury cause *wage* loss (as opposed to loss of *earning capacity*).

If the Legislature intended to abrogate such a long-standing, well-established rule, one

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[20] Although *Sotomayer* was an evenly divided case, the justices who would have voted to reverse used the terms "disability" and "loss of earnings" interchangeably, whereas the Act recognizes that disability (i.e., loss of earning *capacity*) and lost earnings/wages and are two different things. Their analysis was thus marred by a misunderstanding of the two concepts.

would expect to see some clear indication of such intent. In fact, however, the only indications are that the Legislature *agrees* with the *Powell* line of cases. Thus, WDCA 301(5), like *Powell*, provides for wage-loss benefits on loss of post-injury work, *without any requirement that the loss of the job be related to the injury.* That subsection, like *Powell*, asks whether the loss of the post-injury employment was without fault. And that subsection, like *Powell*, asks whether the post-injury employment created any new earning capacity. Since, in short, the Legislature endorsed *Powell* by largely[21] codifying it, it would be perverse to read the post-1980 amendments as contradicting the *Powell* line of cases.

D. THERE IS A GOOD REASON FOR NO SUCH REQUIREMENT

Although it is not for the courts to second-guess the wisdom of legislative enactments,[22] the Legislature had a good reason for not creating any injury-causing-wage-loss requirement.

The Act already requires the worker to prove that he was injured on the job; that the injury adversely affected his earning capacity; and that he suffered lost wages. To require

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The amendments that added WDCA 301(5) differ from *Powell* in one respect: where post-injury employment *is under 100 weeks*, full wage loss benefits are payable regardless of fault and regardless of whether the post-injury work created a new earning capacity. This *express liberalization* of *Powell* is not, of course, grounds for divining an *implied* legislative intent to gut the pro-employee aspects of *Powell.*

22

Hanson v Mecosta Co Road Comm'n, 465 Mich 492, 504 (2002).

that the worker prove, in addition, that the lost wages were caused by the injury inserts an additional issue that can only increase the time and expense of prosecuting workers compensation claims.

This is not a hypothetical concern. Since 1997, when *Haske*'s *dictum* about an injury-causing-wage-loss requirement gave employers an excuse to argue that the unemployment was due to work avoidance, over 50 cases involving that defense have reached the Workers Compensation Appellate Commission [23].

The cost of litigating this issue alone has been enormous, and the cost in injustice (denying compensation to workers disabled by work-related injuries) equally significant.

The 1981 Legislature eliminated termination for cause as a defense to loss of a job whenever post-injury employment is under 100 weeks (WDCA 301(5)(e)) and prohibited disqualification for even outright refusal to work unless numerous safeguards are met (WDCA 301(5)(a)). It is inconceivable that this same legislature intended to deny benefits to a worker who was *not* terminated for fault, and *never refused* any offer of work; much less via amendments whose only mention of causation between injury and unemployment was to *limit* disqualification on that basis.

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[23] To save space, Amicus will give only the opinion numbers. Nor is the following list exhaustive. 97 ACO #609; 98 ACO #1, 287, 295, 315, 322, 333, 408, 518, 534, 606, 635, 727, 730; 99 ACO #25, 27, 137, 165, 264, 266, 267, 297, 357, 375, 489, 514, 530, 670, 698, 736, 740, 742, 751, 772, 777; 00 ACO #30, 40, 90, 103, 211, 341, 404, 405, 424, 431, 504, 511, 639; 01 ACO #11, 141.

E. THE HASKE *DICTUM* IS WRONG

What, then, are we to make of the following language in *Haske v Transport Leasing, supra*?

> Unemployment or reduced wages must be causally linked to work-related injury, and a plaintiff may not reject actual wages reasonably offered or avoid or refuse actual wages (at 455 Mich 658-659).
> An employer may refute the causal connection between the partial disability and the employee's unemployment with evidence that other factors are the cause of the unemployment, e.g., an employee's ailments that are unrelated to his previous employment or malingering. (At 455 Mich 662, fn 38)

To begin with, the *holding* of *Haske* was that one need not be totally disabled to be entitled to wage loss benefits, and the question of whether Haske's wage loss was causally related to his injury was not raised by the parties nor necessary to the result of the case. That makes *Haske*'s discussion of the causation requirement *dictum*. It should be recalled why *dictum* is not controlling authority:

> It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles, which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.

Breckon v Franklin Fuel Co, 383 Mich 251, 267 (1970).

Moreover, the genealogy of *Haske*'s *dictum* is suspect. The *Haske* opinion cited *Sobotka v Chrysler Corp*, 447 Mich 1, 26, n 26 (1994), which in turn quoted Professor Larson:

> Of course, if the claimant's continued unemployment is the result, not of his employment-related impairment, but of personal ailments unrelated to his employment, there is no possible ground for continuing temporary benefits. [Larson, supra, Sec. 57.12(e), p 10-56]

This statement was *dictum* in *Sobotka* as well, there being no claim that Sobotka's wage-loss claim was barred by lack of any causal relationship between his unemployment and injury. Moreover, Professor Larson cited only four (4) cases in support of his "rule," none of them from Michigan (that portion of Larson attached). Of the four cases, one was a Pennsylvania case standing for the *different* proposition that workers compensation is not payable where the work injury no longer affects *earning capacity*, while another was a Florida case holding that compensation *is* payable where, despite intervention of a non-work disabling condition, the work injury is still affecting *earning capacity*.

Neither Larson nor *Sobotka* nor *Haske* recognized the long line of holdings from Michigan[24] to the effect that wage-loss benefits are payable even if the unemployment/wage loss is caused by non-work conditions. The *Haske dictum* is built on sand, and cannot stand against the plain language of the statute.

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[24] See Discussion III.C., *supra*.

IV. EVEN IF A CAUSAL RELATIONSHIP WERE REQUIRED, IT EXISTS IN THE CASE AT BAR

The lack of statutory language creating any injury-causing-wage-loss requirement precludes determining what precise causation standards would apply to such a requirement. However, since the earliest days, it has been held in worker's compensation cases that a causation requirement is satisfied if the work is *one* of *several* causes. *Kostamo v Marquette Iron Mining Co*, 405 Mich 105, 126 (1979); *Monk v Charcoal Iron Co*, 246 Mich 193, 197 (1929); *Schroetke v Jackson-Church Co*, 193 Mich 616, 625 (1916); *Neumeier v Menominee*, 293 Mich 646, 649 (1940).

Applied to a worker who goes off work for non-injury-related reasons, while the non-injury reasons are obviously a cause of the resultant unemployment, so long as the original on-the-job injury is continuing to affect the worker's wage-earning capacity (as required by WDCA 301(4)), the work-related injury is likely to be a *concurring* cause of the unemployment. And since the work need not be the *sole* cause, such a case of concurrent causation is compensable. *LeTourneau v Davidson, supra*, at 218 Mich 340 (compensation continues, though age and senility began to contribute to unemployment); *Hansel v Chrysler Corp*, 58 Mich App 173 (1975) (right to compensation for hand injury continued, though subsequent leg injury contributed to disability); *Medacco v Campbell, Wyant & Cannon Foundry, supra*, at 48 Mich App 227 (1973) (subsequent heart attack did not cut off right to wage loss benefits).

So, in the case at bar, although the immediate cause of plaintiff's going off work was a vacation, and subsequent unemployment was caused by a non-injury-related stroke, that was not the only reason for his unemployment thereafter. Specifically, since Plaintiff's inability to do heavy lifting limits Plaintiff's ability to obtain work from employers not willing to accommodate that restriction, it follows that that restriction, caused by a work-related injury, is a *concurring cause* of Plaintiff's continuing unemployment. Since concurrent causation is enough, Plaintiff satisfied an injury-causing-wage-loss requirement, even if such a requirement were created.

V. THE CASE SHOULD BE REMANDED FOR APPLICATION OF WDCA 301(5)

Since the only basis for the magistrate's denial of benefits was a no injury-causing-wage-loss requirement which, as we have seen, does not exist, the magistrate's denial should be reversed.

It is clear that the injury-causing-lost-earning-capacity requirement that does exist (in WDCA 301(4)) was satisfied, since Plaintiff's work-related injury caused restrictions that preclude jobs involving heavy lifting, thus constituting "a limitation" in "work" (meaning *some* work, not *all* work) within Plaintiff's qualifications and training.

It is also clear that Plaintiff's loss of work was not due to his own fault, hence not disqualifying under WDCA 301(5)(d) or (e).

That leaves the question of whether Plaintiff's post-injury work created a new earning

capacity that would offset his wage loss, per WDCA 301(5)(d). Since that requirement applies only where there are at least 100 weeks of post-injury employment, it is necessary to determine how many weeks Plaintiff worked post-injury. However, this question was not fully explored at the trial level.[25] Since this case could fall on either side of the line depending on what the evidence shows,[26] rather than decide an issue that is not squarely presented[27] and which may turn out to be moot, the Court should remand to the magistrate[28] for the taking of additional proofs on the question of how many weeks of post-injury employment there were.

If it turns out that the post-injury employments were under 100 weeks, wage loss benefits would be payable without regard to post-injury earning capacity. If the post-injury employments total over 100 weeks, the magistrate should determine whether the post-injury employment created a new earning capacity.

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25 For example, the record does not show how long, if at all, the Plaintiff worked between his June, 1994 injury and initial surgery in October, 1994.

26 While post-injury work in 1994 would *apparently* boost post-injury employment over 100 weeks, there may be vacations and other periods of unemployment that have not been taken into account that would reduce post-injury employments to under 100 weeks. See, e.g., a March 11, 1996 slip that took Plaintiff off work for one week (Px3).

27 Namely, how one calculates wage-loss benefits where post-injury employments are 100 or more weeks.

28 The remand should be to the magistrate because, although the Appellate Commission has fact-finding powers, it is not equipped for the taking of additional evidence.

Respectfully submitted,

LIBNER, VanLEUVEN, EVANS,
PORTENGA & SLATER, P.C.

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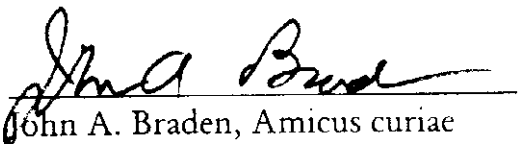
By 
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